



H.R. 3773 – The RESTORE Act

EXECUTIVE SUMMARY

Representative John Conyers (D-MI) introduced the RESTORE Act of 2007 (H.R. 3773) on October 9, 2007. The bill, as amended, was approved by the House Judiciary and Intelligence Committees on October 10, 2007, along party lines. The bill is expected to be considered on the floor on October 17, 2007.

On August 4, 2007, the House passed the bipartisan Protect America Act. The act allows our intelligence community to more effectively collect foreign intelligence in foreign lands, enabling them to obtain critical information at the critical time. President Bush signed this short-term fix into law on August 5, 2007. It expires in February 2008.

During committee consideration of H.R. 3773, Republicans in both the Judiciary Committee and the Intelligence Committee offered a substitute amendment that would have extended the Protect America Act permanently and would have provided retroactive liability protection to companies alleged to have assisted the Government in the aftermath of the 9/11 attacks.

Republicans on the Judiciary and Intelligence Committees strongly oppose H.R. 3773, arguing (among several concerns) that it fails to give the intelligence community the tools it needs to quickly respond to terrorist threats and inappropriately inserts the courts into the approval process for intelligence collection. The Administration has threatened to veto the bill as written.

FLOOR SITUATION

H.R. 3773 is being considered on the floor under a closed rule. The rule:

- Provides 90 minutes of debate, with 60 minutes equally divided and controlled by the Chairman and Ranking Republican Member of the Judiciary Committee and 30 minutes divided and controlled by the Chairman and Ranking Republican Member of the Intelligence Committee.
- Waives all points of order against consideration of the bill and the amendments except those arising under clause 9 (earmarks) and 10 (PAYGO) of Rule XXI.
- Provides that in lieu of the amendments recommended by the Judiciary and Intelligence Committees now printed in the bill, the amendment in the nature of a substitute printed in Part A of the Rules Committee report, modified by the self-enacting amendment in part B

of such report, shall be considered as adopted and the bill, as amended, shall be considered as read.

- Waives all points of order against provisions of the bill, as amended. This waiver does not affect the point of order under clause 9 (earmarks) of Rule XXI.
- Provides one motion to recommit with or without instructions.
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

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SUMMARY

Clarification of Electronic Surveillance of Non-U.S. Persons Outside the U.S.: The bill clarifies that a warrant is not required for intercepting communications of persons that are not U.S. persons and are not located within the U.S., regardless of whether or not the communications in question pass through wires or surveillance devices located in the U.S.

Intelligence Committee Minority Views: "The bill contains a hollow statement that a court order is not required to intercept communications between non-U.S. persons that are not located within the United States that fails to consider the practical reality of intelligence collection in the 21st century. This would limit the authority to only instances where it could be reasonably determined in advance that a targeted person would communicate with no U.S. person, and would make no call to the United States. Therefore, simply stating that an order shall not be required when both ends of a communication are known has no practical value for our intelligence professionals in the field."

Court Orders for Surveillance of Non-U.S. Citizens Outside the United States Who May Be Communicating with Individuals Within the U.S.: The bill generally requires the Attorney General and the Director of National Intelligence to apply for a FISA court order prior to the surveillance of foreign individuals located outside of the U.S. It also limits the types of intelligence information that intelligence officials can collect to only national security foreign intelligence.

Judiciary Committee Dissenting Views: "Since it was enacted in 1978, FISA never required the government to acquire court orders for such communications, and the legislative history and subsequent Court decisions support that view. It is irresponsible to extend constitutional protections under the 4th Amendment to terrorists, spies and other enemies overseas--an unprecedented act that will threaten our country's security."

The application for the order must include certification that: 1) the targets are reasonably believed to be outside the country and not U.S. persons, who may be communicating with persons inside the U.S.; and 2) the acquisition involves communications providers and is primarily intended to obtain foreign intelligence—which is defined more narrowly than current law. Additionally, the application must include a description of A) the procedures to ensure that the targets are outside the country and not U.S. persons; B) the nature of the information; and C) the standards designed to minimize the acquisition, retention, and dissemination of nonpublic information of U.S. persons.

Judiciary Committee Dissenting Views: “The RESTORE Act injects the FISA Court into reviewing and approving the Intelligence Community's procedures for (1) minimization; and (2) ‘guidelines’ for determining that there is a reasonable basis to believe that the telephone is located outside the United States. This is unprecedented and will only burden the Intelligence Community with court review of operational details that will only delay FISA court approval of surveillance orders, all to the detriment of our security.”

The judge must review the application within 15 days. The DNI and the courts must keep a copy of all orders issued for at least 10 years.

Liability: The bill provides liability protection for communications firms participating in the surveillance authorized under this bill. However, it does not provide retroactive liability protection to firms that have assisted the government since September 11, 2001.

Intelligence Committee Minority Views: “Without this liability protection, private companies—that are alleged to have done exactly what their country asked them to—would be subjected to decades of protracted litigation.”

Emergency Situations: The bill provides an exemption for emergency situations, which allows surveillance for up to 45 days as long as the Director of National Intelligence and the Attorney General submit an application for a court order within 7 days. In this circumstance, a judge must be notified at the beginning of the emergency authorization.

Note: Surveillance under this section does not include a liability protection for cooperating communications firms.

FISA Court Review: The bill requires the FISA court to conduct a quarterly compliance review for every warrant issued by the court.

Intelligence Committee Minority Views: “This would put judges in the extraordinary position of supervising intelligence professionals or even U.S. troops overseas. Any court review of the procedures, or processes for surveillance of foreign terrorists in foreign places should allow much greater deference to our foreign intelligence officials who have the expertise and authority to conduct such surveillance. This provision, like so many others in this bill, ignores the intent behind the 1978 FISA bill, which was not to hinder foreign intelligence gathering, but rather to provide a framework for intelligence gathering in the United States.”

Additional Reporting Requirements: The Director of National Intelligence and the Attorney General must give Congress copies of all applications and orders issued within 7 days (excluding emergency situations). They must also submit a quarterly report detailing any incidents of non-compliance with the statute as well as an annual report with the number of emergency orders issued and incidents of non-compliance with emergency orders.

Judiciary Committee Dissenting Views: “The RESTORE Act requires the DNI and the Justice Department to submit reports every 120 days on foreign surveillance operations, including any instance of non-compliance with any court requirement. The DNI and Justice Department are already required to provide detailed information on such surveillance to the Senate and House Intelligence Committees, and there is no need to increase that requirement.

The Justice Department Inspector General must submit a quarterly audit, including 1) the number of targets located in the U.S.; 2) the number of persons located in the U.S. whose communications were collected; and 3) the number and nature of the reports disseminated with the information of a U.S. person.

Judiciary Committee Dissenting Views: “The DOJ IG does not have the expertise or knowledge of the FISA process, the Intelligence Community's activities, and inner-workings of various agencies to be able to conduct meaningful reviews. Moreover, the intelligence agencies (e.g. CIA, NSA) already have Inspector Generals who conduct regular audits and will continue to do so even if this provision was enacted.

Access to White House Documents: The bill requires the Justice Department Inspector General to audit all federal government programs (including the Terrorist Surveillance Program) since September 11, 2001, involving the acquisition of communications without a court order. The audit would mandate access to ALL documents concerning the legal authority of a program, including internal White House documents and legal advice to the President.

Intelligence Committee Minority Views: “An audit by the DOJ IG would, once again, impose non-Intelligence Community personnel into the work of the Intelligence Community. More significantly, the DOJ IG auditing provision is of questionable constitutionality, as it would require an executive branch agency to audit the conduct of the President. It also requires the President, a classifying authority, to grant access to extremely sensitive information, and requires the IG to acquire and produce documents containing legal advice given to the President by his lawyers.”

Government Database: The bill establishes a federal database to keep track of instances where the communications of U.S. persons were disseminated by the intelligence community.

Intelligence Committee Minority Views: “Normally, U.S. person information that does not contain foreign intelligence information would be either expunged or age-off of NSA’s databases. As such, this provision would alarmingly heighten the intrusion on the privacy of U.S. persons rather than protect it.”

Additional FISA Court Judges: The bill increases the size of the FISA court from 11 to 15 judges and provides that the judges must be drawn from “at least 7” U.S. judicial districts (as opposed to “7”).

Funding and Additional Personnel Authorization: The bill authorizes such sums as are necessary and additional staff levels to ensure timely processing of warrant applications and to carry out reporting requirements.

Information for Congress on the Terrorist Surveillance Program (TSP) and Similar Programs: Within 7 days of enactment of the bill, the bill would require the President to “fully inform” members of the House and Senate Intelligence Committees regarding TSP and any other electronic surveillance program since 9/11 that involved U.S. persons.

Sunset: The bill sunsets on December 31, 2009.

Judiciary Committee Dissenting Views: “Terrorists do not lay down their arms or change their objectives when a sunset fast approaches, and neither should the United States abandon tools on a date certain in the future.”

BACKGROUND

The Foreign Intelligence Surveillance Act (FISA) of 1978 created the framework for foreign intelligence gathering using electronic surveillance. The FISA law established two courts, the U.S. Foreign Intelligence Surveillance Court (FISC), and the U.S. Foreign Intelligence Surveillance Court of Review, to authorize these foreign intelligence gathering activities.

In 1978, almost all international calls, or long-haul communications, were made over the air and bounced off satellites wirelessly. Those communications did not require an order under the FISA statute.

To protect the civil liberties of Americans, FISA required court orders for any signals that went through a wire, which is how most short-haul communications were conducted at the time the law was enacted.

Technology, however, has progressed by leaps and bounds in the six years since the Sept. 11 attacks, let alone in the three decades since the FISA laws were crafted. The outdated FISA laws restricted our intelligence community from utilizing a key tool in fighting the war on terror and protecting our national security.

Prior to enactment of the Protect America Act of 2007 (P.L. 110-55) in August 2007, wholly international communications transmitted over a wire required a FISA order. This requirement hindered our intelligence community’s ability to collect vital intelligence from terrorists communicating with other foreign intelligence targets located in a foreign country.

It is difficult to compile enough information in a short period of time on a foreign person of interest to satisfy the FISA statute, and this is where the terrorist loophole arises.

According to the Director of National Intelligence, Michael McConnell, “We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs.” ([Testimony to Senate Intelligence Committee, 5/1/07](#))

On August 4, 2007, the House passed the Protect America Act, a bipartisan act that closed the terrorist loophole. The law allowed our intelligence community to more effectively collect foreign intelligence in foreign lands, enabling them to obtain critical information at the critical time. President Bush signed this short-term fix into law on August 5, 2007. It expires in February 2008.

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Rep. Heather Wilson (R-NM) has also proposed narrowly-tailored legislation to close this loophole by allowing surveillance targeting foreign communications without a warrant.

During the 109th Congress, the House passed H.R. 5825, The Electronic Surveillance Modernization Act, which fundamentally modernized and enhanced FISA. The bill, however, never passed the Senate.

ADDITIONAL VIEWS

The Administration issued a veto threat of the bill in its current form. “This bill does not result in permanent FISA modernization and it contains no retroactive liability provision. H.R. 3773 therefore falls far short of providing the Intelligence Community with the tools it needs to collect foreign intelligence effectively from individuals located outside the United States.” ([Statement of Administration Policy: H.R. 3773](#), 10/16/2007)

Intelligence Committee Republicans: “This bill is clearly designed to meet a political need of the Democrat majority, and not the country's needs during a time of continued struggle against radical jihadists and other hostile acts by foreign powers. This bill fails to provide the effective tools that the Intelligence Community has repeatedly stated it needs to efficiently collect foreign intelligence information to prevent and disrupt terrorist plots.” (Minority Views of the Intelligence Committee Report, 10/12/2007)

Judiciary Committee Republicans: The RESTORE Act “would significantly limit the Intelligence Community from conducting foreign intelligence collection, improperly inject the FISA court into review of operational details and expand oversight responsibilities to unqualified entities.” (Dissenting Views of the Judiciary Committee Report, 10/12/2007)

COST

“Several sections of the bill would, if implemented, increase discretionary costs. However, CBO does not have access to the information necessary to estimate the impact on the budget of implementing H.R. 3773. Any changes in federal spending under the bill would be subject to the appropriation of the necessary funds. Enacting H.R. 3773 would not affect direct spending or revenues.” ([Congressional Budget Office Estimate](#), 10/15/2007)

AMENDMENTS

Self-Enacting Amendment that will be considered approved upon adoption of the Rule

The amendment would clarify that no court order is required for surveillance where the sender and recipients are not known to be persons and reasonably believed to be located outside the . It would also allow the FISA Court to issue temporary orders authorizing surveillance pending the appeal of an application under section 105B. Further, it would require that any directive seeking the assistance of a communications service provider in conducting surveillance include a certification that the directive is in compliance with specific, relevant provisions of FISA. It would extend the statute of limitations for the penalty provisions of FISA from five years to ten years. Finally, it would clarify that the RESTORE Act does not confer any rights or privileges on non-United States persons.

STAFF CONTACT

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